

## REMARKS

The claims are 1-8, 10-13, 15-23 and 27.

Claims 1 and 10 have been amended to better define the intended invention and to make clear that the rippled wafer that may be used in a confectionery product is a baked flour-based rippled wafer. Support for the amendment may be found, for example, in paragraphs [0040 and 0046] of the publication of the subject application, U.S. Publication No. 2007/0166434 (“the ‘434 publication”). No new matter has been added. Entry of the present amendments and favorable reconsideration of the claims is respectfully requested.

Claims 1-8, 10-13, 15-19 and 23 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious over U.S. Patent No. 3,973,044 (Giddey). Claims 20-22 stand rejected under 35 U.S.C. § 103(a) as being allegedly obvious over Giddey in view of WO 03/005832 (Clarke) and GB 2316852 (Biggs). Applicants respectfully traverse these rejections.

Prior to addressing the grounds of rejection, Applicants wish to briefly review certain key features and advantages of the present application.

The present invention is directed toward a baked flour-based rippled wafer comprising a plurality of non-concentric convolutions of a convoluted wafer ribbon that may be used in a confectionery product. The rippled wafer, is made from baking a flour-based wafer batter, has an average of at least 12 turns/cm<sup>2</sup> of cross sectional area, wherein a turn is a change in direction of the wafer ribbon of at least 45° and the cross sectional area is the volume of the formed wafer divided by the length of the formed wafer. The folded convoluted wafers of the prior art are comprised mainly of flat or straight portions

of wafer ribbon with relatively few turns. In contrast, the inclusion of low density, low satiating rippled wafers of the present invention, which is light, crisp and evenly textured with no tooth-packing and no hard “snap” in confectionery products, delivers textural lightness and variation not found in known confectionery products. Paragraph [0023] of the ‘434 publication. The inventors of the subject invention discovered that the average number of turns for a given cross sectional area directly relates to the crispness of the formed wafer. Paragraph [0067]. Thereby, they invented the wafer of the present invention, which has greater convolutions and exhibits better crispness than the wafers previously known in the art. *Id.* and Tables 4 and 5.

Giddey discloses a proteinaceous food product, most applicable to a simulated meat product (Col. 4, ln 67-68), and a method of producing the product wherein it forms a structure of many small and larger folds. Compaction of the material of Giddey creates a fibrous structure which is said to approximate the “structure of natural meat where fibers are dispersed in a matrix of connective tissue.” (Abstract). It is clear that the goal of Giddey is to create a product that closely approximates the structure of natural meat. Col. 2, ln 8-10.

The present invention is clearly directed to a product that is far different than that of Giddey. The rippled wafer of the present invention, which is formed with a baked flour-based batter, is used in a confectionery product. This is made abundantly clear through out the specification and specifically so in independent claim 10. There is absolutely no doubt that a person skilled in the art would recognize the significant difference between a meat-type product that tried to approximate the fibers and connective tissue of natural meat with a confectionery wafer product that provides a “lighter bite” (see

paragraph [0056]) and “delivers textural lightness and variation not found in known confectionery products.” (see paragraph [0023]).

Applicants continue to submit that a wafer is not merely a thin piece of food, as argued by the Examiner. It is respectfully submitted that the context of the present specification makes clear that the rippled wafers of the present invention are flour-based wafers for use in confectionery products. This has now been made even more abundantly clear by the amendments made herein, wherein the claims recite a baked flour-based rippled wafer. The textural properties sought in Giddey, i.e., the fibers of natural meat and connective tissue, would simply not lead a person of ordinary skill to use the techniques described in Giddey to produce baked flour-based “low density, low satiating rippled wafers which melt away quickly with no tooth-packing and no hard snap.” Paragraph [0023]. It is respectfully submitted that the properties sought by Giddey and those of the the present invention are so far removed from one another, that the disclosure of Giddey simply would not have suggested the presently claimed invention.

The Examiner relies on Giddey’s teaching that the parameters of its process may be “altered to obtain products of different properties” and asserts that one of ordinary skill in the art would have had a reasonable expectation of successfully making a confectionery product based on Giddey. Applicants respectfully must disagree. It is not seen that anyone, let alone a person of ordinary skill, seeking to make a confectionery product, would look to use process conditions that were applicable to making a product that had the texture of a natural meat with a reasonable expectation of successfully producing a rippled wafer product for use in a confectionery.

In addition, Applicants continue to assert that Giddey fails to teach or suggest that the ripples of the simulated meat product of Giddey are produced having at least 12 turns/cm<sup>2</sup> of cross sectional area, a feature of the claimed invention. As explained above, the present invention teaches that the average number of turns per cm<sup>2</sup> of the cross sectional area of the wafer are related to the crispness of the formed wafer and that adopting a minimum of 12 turns/cm<sup>2</sup> of cross sectional area attributes a lightness and variation of the wafer not found in wafers in the prior art. As Giddey is unrelated to the production of a baked flour-based wafer or confectionary product, it does not and can not realize the benefits achieved by the number of turns in relation to crispness of the final product.

The Examiner states that Giddey discloses smaller folds in the range of from 0.1 to 0.5 millimeters, yet fails to provide a basis for how this renders the feature of having at least 12 turns/cm<sup>2</sup> of cross sectional area obvious. According to MPEP § 2142, before the applicant is under any obligation to submit evidence of nonobviousness, the examiner must produce a *prima facie* case of obviousness, which requires explicit analysis and an articulated reasoning to support the conclusion of obviousness. Applicants submit that the Examiner has not met this initial burden with regard to the feature of “the rippled wafer having an average of at least 12 turns/cm<sup>2</sup> of cross sectional area, wherein a turn is a change in direction of the wafer ribbon of at least 45° and the cross sectional area is the volume of the formed wafer divided by the length of the formed wafer.”

Simply, Giddey fails to disclose or suggest all of the elements of the presently claimed invention. Giddey fails to teach or suggest a baked flour-based rippled wafer comprised of a plurality of non-concentric convolutions and having an average of at

least 12 turns/cm<sup>2</sup> of cross sectional area. Consequently, Applicants respectfully request withdrawal of the obviousness rejection.

Clarke and Biggs fail to remedy the deficiencies of Giddey. First, since Giddey relates to a method of making a proteinaceous food product, it provides no guidance as to how to manipulate a baked flour-based wafer batter. Therefore, Applicants submit that Giddey would not have been combined with methods of making wafers and confectionary products to yield predictable results. According to MPEP § 2143.01, the mere fact that references can be combined does not render the resultant combination obvious unless the results would have been predictable.

However, even if Giddey were combined with Clarke and Biggs, the combination of references fail to render the presently claimed invention obvious.

Clarke discloses an apparatus and method for producing a regular film of foodstuff, while Biggs discloses a process for shaping a wafer and discloses that a wafer may be shaped into a desired form, such as a fold or bend. These references are cited by the Examiner for teaching the addition of a secondary film, such as layers of ice cream and chocolate, and that the wafer may be pre-coated with chocolate, respectively.

Even if, *arguendo*, the Examiner's positions were taken as true, the combination of references fails to teach or suggest all of the limitations of the claimed invention. The references fail to disclose or suggest a rippled wafer (i) having a plurality of non-concentric convolutions, (ii) having an average of at least 12 turns/cm<sup>2</sup> of cross sectional area, (iii) a turn that is a change in direction of the wafer ribbon of at least 45° and (iv) a cross sectional area that is the volume of the formed wafer divided by the length of the formed wafer. Therefore, Applicants submit that Giddey, Clarke and Biggs, alone

or in any permissible combination, fail to render obvious the present invention and respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection.

In view of the foregoing amendments and remarks, Applicants respectfully request entry of the present amendment, favorable reconsideration and early passage to issue of the present application.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our below listed address.

Respectfully submitted,

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